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FAMILY LAW

Cases and Materials

Volume I

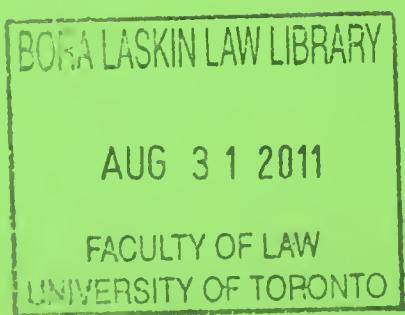
Brenda Cossman and Carol Rogerson
Faculty of Law
University of Toronto

2011-2012

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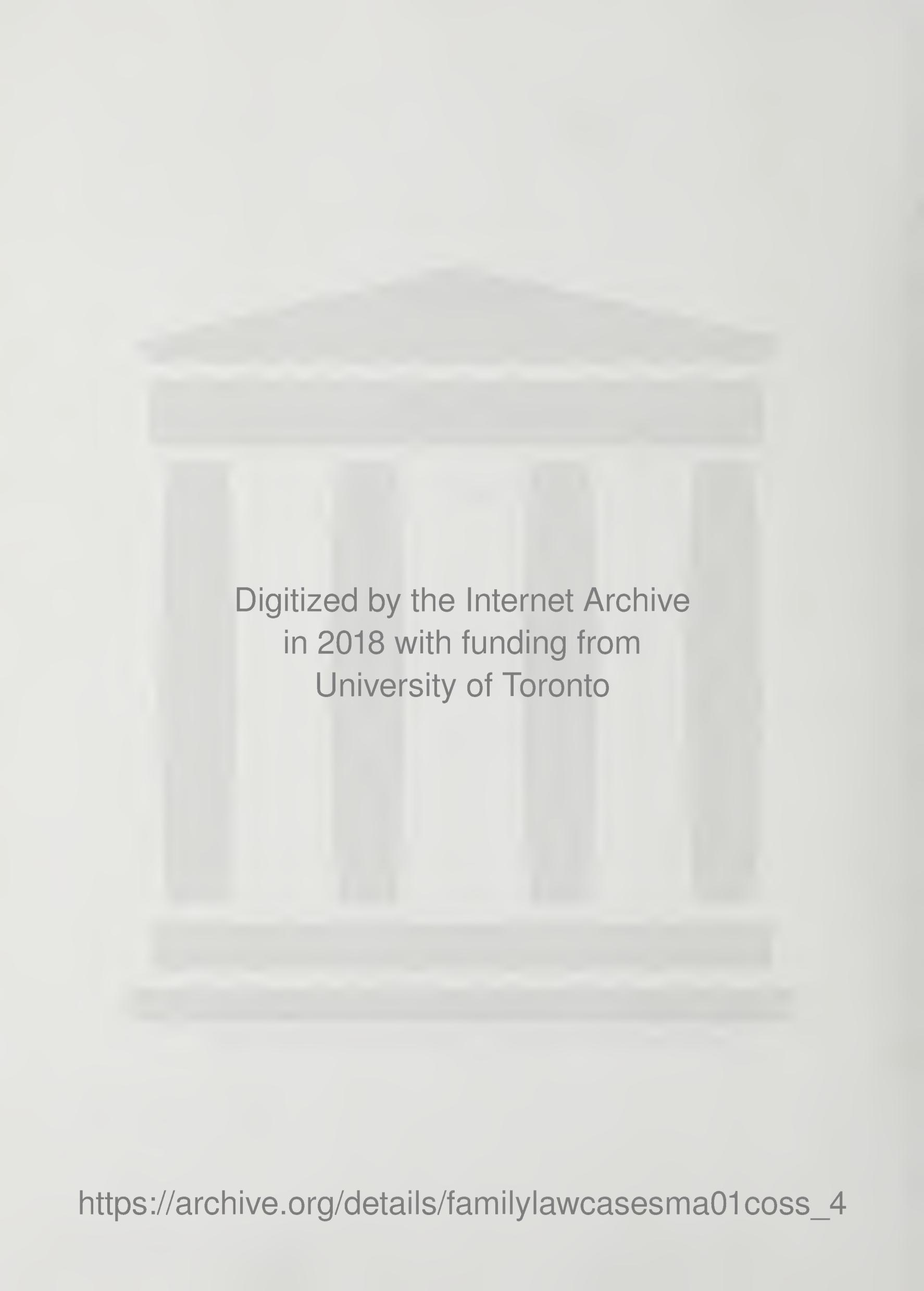
Volume I

**Brenda Cossman and Carol Rogerson
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but a glimpse of a fleeting moment. For some of the very factors that give our present social organization a *quasi*-feudal look, are also elements of instability within it.

For example, I have noted our increasing dependence on wage labor and certain changes in the bonding of the employment relationship which call be characterized as involving an increase in job security. But this security, a mere creation of law, could be wiped out by a severe economic crisis. A second troublesome factor than prevents any simple generalization is that for many individuals (women and racial and ethnic minorities in particular) *access* to the preferred forms of new property (good jobs and work-related benefits) is limited. For some, this means their relationship to government and government benefits, a less desirable form of new property, assumes paramount importance. For others, it means they depend on family relationships which seem to be becoming increasingly fragile. Finally, although heightened dependency on work and lowered dependency on family relationships have had certain effects on the law some of which I have sketched, we can only speculate as to what long range *social* effects there will be from a situation where individuals are increasingly dependent on work, yet where work dissatisfaction seems widespread. What are we to make of the curious apparent exchange of values through which legal norms governing the workplace are increasingly particularistic and personalized, looking toward the continuation of the relationship with adjustments on both sides; while legal norms pertaining to the family are increasingly universalistic and neutral, facilitating 'discharge' and 'replacement' when 'performance' does not come up to standards or expectations?

I am far from having reached a conclusion in my own thinking and research on the matters discussed here....

B. UNMARRIED COHABITATION

Note: Terminology

There is frequently some confusion regarding the use of the terms "common law marriage" and "common law relationship". The terms are often used interchangeably and many people speak of a common law relationship as though it were the same as a legal marriage. In fact, a common law marriage, or a marriage valid by common law, differs from a common law relationship both in its formation and in the rights and obligations which attach to it.

In Ontario, a common law *relationship* arises by force of law on a statute-by-statute basis, and is typically based on a period of cohabitation. For example, for the purpose of support rights under the Ontario *Family Law Act*, parties are deemed to be in a common law relationship when they have cohabited continuously for at least three years or if they are parents to a child and have cohabited in a relationship of "some permanence". However, many statutes, both federal and provincial, conferring public benefits adopt a definition of common law relationship which requires that the parties have cohabited continuously for one year or are parents to a child in a relationship of some permanence. Parties to a common law relationship (often referred to as common law spouses or common law partners) do not automatically have the same rights and responsibilities as married couples; in certain circumstances the law has simply decided to treat them in the same way as married couples. A common law spouse may withdraw, unmarried, from the relationship at any time. Because there has been no marriage, no divorce is required to dissolve the relationship.

In contrast, a common law *marriage* results from a ceremony which lacks the legal formalities of compliance with statutory requirements and in which the parties verbally agree to take each other as husband and wife. The common law recognizes such marriages in circumstances where compliance with the statutory formalities is impossible, such as, for example, situations of war. In contrast to a common law relationship, a common law marriage is treated as a legal marriage for all purposes, and thus, a common law marriage may be dissolved

only by way of divorce. In *Keddie v. Currie* (1991), 60 B.C.L.R. (2d) 1, the British Columbia Court of Appeal considered the law concerning common law marriages in some detail. The Court held that common law marriages could not, in general, be entered into in British Columbia because the British Columbia *Marriage Act* specifically provided for the formal requirements of marriage and the circumstances would be rare where a couple wishing to marry was unable to comply with the statutory requirements.

Statistics Canada, *Family Portrait: Continuity and Change in Canadian Families and Households in 2006*

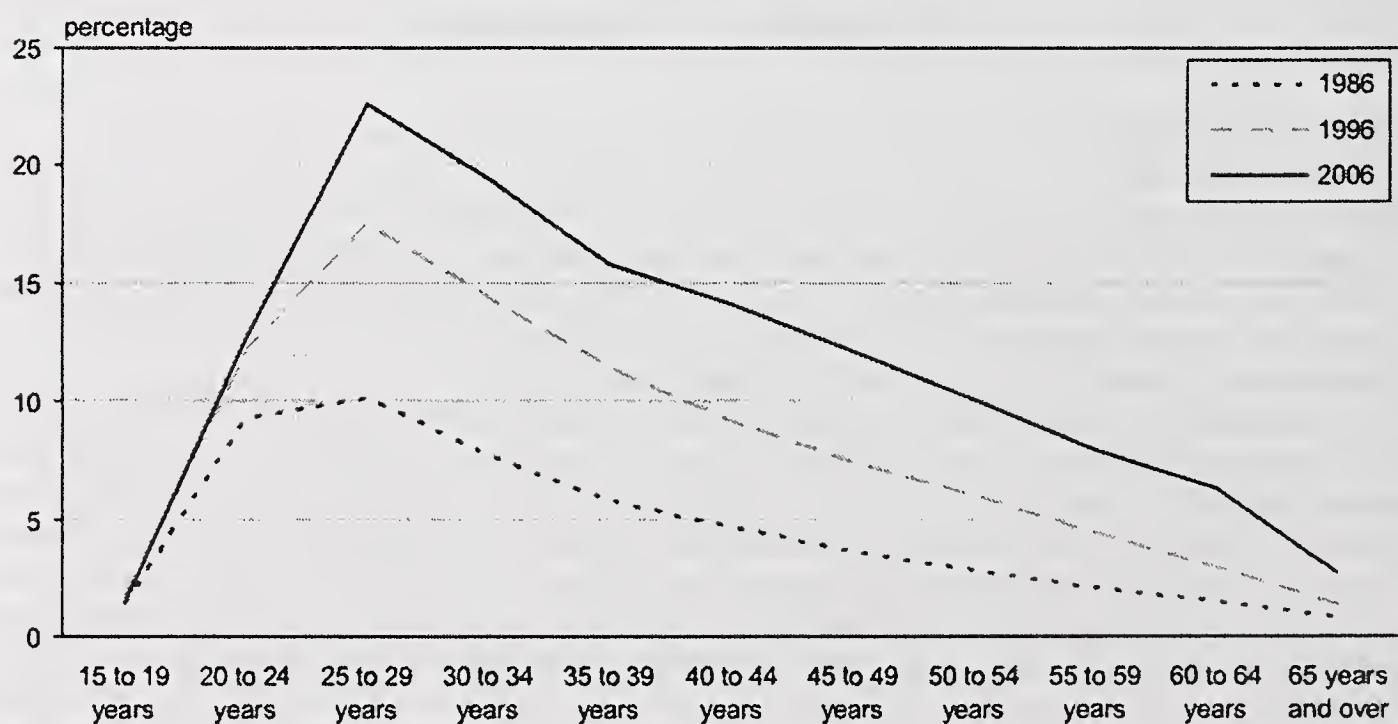
(Ottawa: Statistics Canada, September, 2007, Catalogue no. 97-553-XIE) at 20-22, 24 – 25, 35-36

Living as part of a common-law couple growing rapidly, especially for older age groups

Common-law unions have increased in popularity over the past 25 years in Canada. The census enumerated 2.8 million persons aged 15 and over who lived in a common-law union in 2006. They represented 10.8% of the population, up from 9.7% in 2001.

Common-law unions were most prevalent among young adults and they were most popular among individuals aged 25 to 29. About 22.6% of people in this age group were in a common-law union in 2006, up from 20.6% five years earlier.

Figure 8 Persons in common-law couples increasing for all age groups



Sources: Statistics Canada, censuses of population, 1986, 1996 and 2006.

The increase in common-law relationships suggests greater social acceptance of this family structure, as well as a desire to be part of a couple, but perhaps with fewer perceived emotional or financial obligations than those generally associated with marriage.

Although common-law unions were more predominant among the young, in recent years older age groups have experienced the most rapid growth. Gains have been especially fast during the past five years among people in their forties and over. The number of individuals aged 50 to 64 in common-law unions rose 77.1% between 2001 and 2006, the fastest pace of all age groups.